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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/756,908

06/12/2004

Bobby Joe

3092

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02/28/2007

EXAMINER

WEINSTEIN, STEVEN L

ART UNIT

PAPER NUMBER

1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
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3 MONTHS

02/28/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

Application No.

10/756,908

Applicant(s)

JOE, BOBBY

Examiner

Steven L. Weinstein

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-3 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_.

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The following is a quotation of the appropriate paragraphs of 35

U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3 are rejected under 35 U.S.C. 102(b) as being anticipated by Hollis et al (3,483,001) or Daniel et al (6,447,829) or Busse et al (6,524,634).

It is noted that claims 1-3 are being construed as an ice cream capable of being microwaved (or microwavable), which is all the preamble recites. Thus, all three claims recite capabilities or properties of the ice cream. For example, claim 1 recites that the product is capable of not being frozen before packaging, claim 2 recites that the product does not use air to make it edible (but does not exclude having air in it, for example, for some other reason, and claim 3 recites that the texture and consistency of the ice cream of hand cranked, home made ice cream (but does not recite when it has this property; the non-microwaved, frozen product does not have this property). Keeping this analysis of the claim language in mind, both Hollis et al and Daniel et al disclose dairy based, ice cream products which would be capable of being exposed to microwave, would be capable of being packaged without pre-freezing, would be capable of having similar texture and consistency to hand-cranked home made ice cream (with or without microwaves) and do not include air in the product at all, whether for eatability, or for any other reason. Thus, the claims, as written, are anticipated by Hollis et al and Daniel et al. In regard to Busse et al, although Busse et al employs a no overrun ice cream as a

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coating, (this being a matter of intended use), nevertheless, in regard to the claims, Busse et al evidences the fact that applicant is not the first to make an ice cream without overrun, and this product would have the same properties and capabilities recited in the claims.

The remainder of the references cited on the PTO 892 form are cited as pertinent art. Note, for example, that Moffett ('566), Chirnomas, Ito, and Efooto all teach exposing frozen ice cream to microwave energy to soften the frozen ice cream (e.g. Moffett '566 – “quickly softening a package of ice cream which has been frozen to a very hard state...” (using a radar range, which is a microwave energy generator)).

Applicant now has two choices. Upon reviewing this Office action, and the references relied upon in the rejection, applicant may agree with the Office position and thus choose to end the prosecution of this application by either not responding to this Office action within the Statutory Period set on the accompanying cover sheet, thus abandoning the application, or by filing a Letter of Express Abandonment, stating that applicant expressly abandons the application.

The other choice is that applicant may choose to continue prosecution of this application by filing a response within the Statutory Period noted above. If applicant chooses to respond, note the following. Applicant must request reconsideration in writing, and must distinctly and specifically point out the supposed errors in the Office action and its conclusion of anticipation under 35USC102. The applicant must respond to every ground of objection and rejection in the prior Office action specifically addressing any reference(s) applied against the claim(s) and any combination of

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references applied against the claim(s). Applicant's response must appear throughout to be a bona fide attempt to advance the case to final action. The mere allegation that the Office has erred will not be received as a proper reason for such reexamination or reconsideration.

If applicant chooses to respond, applicant may file an amendment to the specification and/or claims. However, the amendment cannot contain New Matter, which is defined as subject matter not necessarily and inherently supported by the specification and claims as originally filed. In amending an application in response to a rejection, applicant must clearly point out why applicant thinks the amended claims are patentable in view of the references applied and also point out where there is support for the amended language in the specification as originally filed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L. Weinstein whose telephone number is 571-272-1410. The examiner can normally be reached on Monday-Friday 7:00 A.M.- 2:30 P.M..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

*Steve Weinstein*  
STEVE WEINSTEIN  
PRIMARY EXAMINER 1761  
2/23/07